

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **Arb. P.No. 160/2007**

Date of decision : 5th October, 2007

M/S. SCON CONTRACTS PETITIONER

! Through : Mr. Jasmeet Singh, Advocate

Versus

\$ NEENA DHINGRA RESPONDENT

^ Through : Ms. Gunita Pahwa Advocate
Mr. Rupesh, Advocate

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CORAM:
HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not?
- (3) Whether the judgment should be reported in the Digest ?

ARUNA SURESH, J. (Oral)

1. Present petition has been filed by the petitioner M/s. Scon Contracts against the respondent under section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act') for appointment of an arbitrator. The petitioner was granted civil work for the respondent's building at Plot No.33-34, Sector 5, IMT, Manesar, Gurgaon vide letter of intent dated 4th April, 2005. As per

the terms of the letter of intent 'Articles of Agreement' issued alongwith the tender documents were to be executed on stamp paper but the same could not be done. The petitioner executed more than 80% of the contracted work, however, dispute arose between the parties. As per the Arbitration Clause 15 contained in the 'Articles of Agreement' all disputes arising inter se the parties related to the work awarded in terms of the letter of intent are referable for adjudication to the arbitrator only.

2. Respondent failed to appoint an arbitrator despite service of notice dated 10th January, 2007, hence this application.

3. Respondent though has not filed any formal reply to the application, has contested the same. One of the objections raised by the respondent is that there is no arbitration agreement between the parties and therefore the present application is not maintainable. Learned counsel for the petitioner has referred to letter of intent dated 4th April, 2005 to say that as per this letter, the petitioner was appointed as civil contractor by the

respondent on the terms and conditions contained in clause 1 to 7 of the said letter of intent. According to him, 'Articles of Agreement' issued alongwith the tender documents are a part of this letter of intent as is so specifically mentioned in the last line of the said letter dated 4th April, 2005. The relevant line of this letter reads as :-

“Apart from the above the “Articles of Agreement” issued along with tender documents shall be executed on stamp paper.”

After reading this line to say that 'Articles of Agreement' form part of letter of intent is not correct. The petitioner was required to execute the Articles of Agreement on stamp paper. As admitted by the petitioner in para 9 of the application 'Articles of Agreement' could not be executed on stamp paper.

4. 'Les of Agreement' annexed to the letter of intent when perused is only a draft and lacks material particulars. All the blanks in this agreement which is a cyclostyle material have not been filled in by the employer or by the contractor. The first lines of this

agreement are completely blank. Therefore, it cannot be said that this 'Les of Agreement' was executed between the petitioner and the respondent. It is pertinent to mention here that subsequent two clauses of this agreement have been dully filled in. M/s. Architects Working Group is shown to be appointed as Architects and Consultant. The name of the petitioner nowhere finds mention in this draft agreement. Clause 10 of the agreement speaks about the payment terms. Even blanks in this clause are not filled in by the parties. This contract is not signed by any of the parties to the present petition. Therefore, this 'Articles of Agreement' is only a draft and is not a duly executed document. Clause 15 contained in this agreement cannot be termed as arbitration agreement between the parties for referring their disputes connected with the agreement to the arbitration of sole arbitrator under the Act.

5. Schedule I General Conditions of Contract are equally blank and are devoid of material particulars. From this document it is difficult to say that there was an agreement inter se the parties to invoke provisions of Arbitration Act whenever there was a dispute.

6. Learned counsel for the petitioner has submitted that petitioner has executed more than 80% of the work as awarded by letter of intent dated 4th April, 2005. It may be that the petitioner has executed the work as awarded but then the execution of work as awarded by letter of intent does not in any manner raises the presumption that clauses contained in the draft articles of agreement, which was not executed, can be invoked and petitioner can seek appointment of an arbitrator in terms of the clause 15 of the said 'Articles of Agreement'.

7. Section 7 of the Act referred to by the learned counsel for the petitioner also does not apply to the draft articles of agreement. Section 7 of the Act defines the arbitration agreement. According to this definition, the agreement by the parties to submit to an arbitration all or certain disputes which have arisen and which may arise between them in respect of defined legal relationship whether directly or not is an arbitration agreement. This arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. An arbitration Agreement has to be in writing and an agreement is considered in writing if it is

contained in the documents signed by the parties by exchange of letters, telex, telegram or other means of telecommunication which provide a record of the arbitration agreement or by exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other party. Even reference in a contract to a document containing an arbitration clause constitutes the arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

8. In the present case, the 'Articles of Agreement' containing the arbitration agreement though is in writing, is not signed by any of the parties. In fact there is no legally executed agreement inter se the parties to create a contractual obligation between them. An arbitration agreement or a document containing an arbitration agreement is to be signed by the parties which is not the case before us. Similarly, the petitioner has not placed on the record any exchange of letters, telex, telegram or any other means of telecommunication to convince the court that they have the records of the agreement and

therefore clause 15 of the 'Articles of Agreement' can be invoked in the facts and circumstances of the present application. Similarly, the reference of the 'Articles of Agreement' in the letter of intent does not create any contractual obligation between the parties as it remained unexecuted and unsigned by the parties and therefore there is no arbitration agreement inter se the parties.

9. Learned counsel for the petitioner has referred to **'Unipack Industries Vs. Subhash Chand Jain and Others', 2002 (1) Arb. LR, 174 (Delhi)**, wherein section 7 of the Act has been interpreted in the following manner:-

“7. In other words as per Section 7 read with Section 2(b) of the Act there has to be an agreement to refer the disputes or certain disputes with respect to defined legal relationship to arbitration. The arbitration agreement has to be in writing but as is apparent from sub-section (4) Section 7 even if it is not signed under certain circumstances contemplated under Clauses (b) and (c) of sub-section (4) to Section 7 still there can be an arbitration agreement”.

10. As observed above none of the requirements

contained in Section 7 of the Act to create any arbitration agreement between the parties are fulfilled in the present case.

11. Learned counsel for the petitioner further submitted that the respondent did not send any reply to the notice, denying the existence of the arbitration agreement and therefore admitted that there existed arbitration agreement between the parties. This argument is also devoid of any merits.

12. Simply because this notice has not been replied which only speaks of referring the disputes arising out of the agreement for arbitration after the expiry of 30 days from the receipt of notice in case the payment was not made within 7 days and non reply to the same does not in any manner can be inferred as an admission to the execution of an arbitration agreement to the advantage of the petitioner. It seems that there has been some complaint by the petitioner against the respondent to the SHO, IMT, Manesar, Gurgaon. The petitioner did file the application under section 9 of the Act and succeed in getting interim relief to the extent of appointment of a

Local Commissioner.

13. Learned counsel for the respondent has submitted that ex-parte order obtained by the petitioner was by concealment of facts and the respondent shall file reply and contest the said application as well on the similar grounds that there is no arbitration agreement inter se the parties. Be that as it may, any order received by the petitioner under section 9 of the Act ex-parte does not give any right to the petitioner to file the present petition under section 11 of the Act.

14. The petition being without any merits is hereby dismissed as not maintainable.

15. File be consigned to record room.

OCTOBER 5, 2007
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ARUNA SURESH
(JUDGE)